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No. 1307

In the Supreme Court of the United States

OCTOBER TERM, 1967

JULES HAIRSTYLISTS OF MARYLAND, INC., JULES HAIRSTYLISTS, INC., AND JULES HAIRSTYLISTS OF VIRGINIA, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, AND IRVING MACHIZ, DISTRICT DIRECTOR OF INTERNAL REVENUE OF MARYLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Since July 30, 1965 (see 79 Stat. 382), Sections 3102 (a) and (c), and 3402 of the Internal Revenue Code have required an employee who receives $20 or more in tips in a calendar month to report the amount of his tips to his employer, who is required to withhold and pay over income tax and the employee's portion of F.I.C.A. taxes, provided there are sufficient wages or other funds belonging to the employee within the control of the employer. An employee who receives less than $20 in tips in a month has an option whether to have these taxes withheld and paid by the employer.

Petitioners operate beauty salons and employ beauticians who receive part of their income in the form

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of tips. Petitioners asked the district court to convene a three-judge court to hear their suit to enjoin the government from enforcing Sections 3102 (a) and (c) and 3402, claiming the statutes to be unconstitutional (Pet. App. 1–15). The district court, without convening the three-judge court, dismissed (Pet. App. 17–22), and the court of appeals affirmed *per curiam* (Pet. App. 23).

The decisions below are correct; there is no conflict or other ground justifying further review by this Court.

In an action seeking to restrain on constitutional grounds the enforcement of an Act of Congress, a three-judge court is required only where the constitutional question presented is a substantial one; the single district judge to whom the application is made has jurisdiction initially to determine the substantiality of the constitutional issue. *Bailey* v. *Patterson,* 369 U.S. 31, 33; *Water Service Co.* v. *Redding,* 304 U.S. 252; *Ex parte Poresky,* 290 U.S. 30, 31–32.

Moreover, a three-judge court may not issue an injunction in contravention of the governing substantive law. If a single-judge district court is prohibited by Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C. 7421(a), from enjoining the assessment or collection of a tax, a three-judge district court likewise would lack jurisdiction to grant an injunction. See, *e.g., Jacobs* v. *Tawes,* 250 F. 2d 611, 614 (C.A. 4).

In substance, petitioners sought a declaratory judgment and an injunction exonerating them from collecting, withholding and paying over income and F.I.C.A. taxes that may accrue in the future. Section 2201 of the Judicial Code, 28 U.S.C. 2201, explicitly prohibits

a federal court from rendering a declaratory judgment with respect to federal taxes. *Wilson* v. *Wilson,* 141 F. 2d 599 (C.A. 4); *Martin* v. *Andrews,* 238 F. 2d 552 (C.A. 9); *Singleton* v. *Mathis,* 284 F. 2d 616, 619 (C.A. 8).

The district courts equally lack jurisdiction to restrain the collection of federal taxes (Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C. 7421 (a)), except in situations where it is clear beyond argument that the government is not entitled under any circumstances to collect the taxes involved. *Enochs* v. *Williams Packing Co.,* 370 U.S. 1, 6. Here, in contrast, it is clear beyond argument that the government is entitled to collect the taxes, and it is just as clear that the government may impose the duty of withholding those taxes on employers such as petitioners. See *Steward Machine Co.* v. *Davis,* 301 U.S. 548; *Helvering* v. *Davis,* 301 U.S. 619; *Abney* v. *Campbell,* 206 F. 2d 836 (C.A. 5), certiorari denied, 346 U.S. 924. The statute is therefore plainly constitutional.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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